United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4060

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4060

SEMION BRONSZTEJN,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act, 8 U.S.C. §1105a, Semion Bronsztejn ("Bronsztejn") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on November 26, 1974. That order dismissed an appeal from a decision of an Immigration Judge finding the petitioner deportable pursuant to Section 241(a)(11) of the Immigration and Nationality Act (the "Act") 8 U.S.C. § 1251(a)(11), by virtue of his conviction on December 13, 1971, upon a plea of guilty, for attempted possession of marijuana pursuant to Sections 110 and 220.25 of the New York Penal Law.

Bronsztejn contends that his plea of guilty to attempted possession of marijuana in the sixth degree does not render him deportable pursuant to Section 241(a)(11) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1251(a)(11).

Statement of the Facts

Bronsztejn is a 26 year old alien who was born in the Soviet Union and was a citizen of Poland prior to entering the United States. He was admitted to the United States for permanent residence on August 12, 1964.

On August 4, 1971 Bronsztejn was arrested and charged with possession of dangerous drugs in violation of Sections 220.20 and 220.10 of the New York Penal Law (T. 8).* Charges were based on the fact that a search of Bronsztejn's apartment had uncovered more than six pounds of marijuana and 154 LSD pills (T. 9). On December 13, 1971 Bronsztejn was convicted upon a plea of guilty for attempted possession of marijuana pursuant to Sections 110 and 220.05 of the New York Penal Law (T. 9).

Thereafter, on April 23, 1973 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings by issuing an order to show cause and notice of hearing (T. 11). The order to show cause charged that Bronsztejn was deportable under section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), by virtue of his conviction under Sections 110 and 220.05 of the New York Penal Law.

At the deportation hearing held on July 6, 1973, the Service introduced into evidence the record of Bronsztejn's conviction, which Bronsztejn conceded related to him (T. 8, p. 6). Bronsztejn conceded the truth of the factual allegations contained in the order to show cause and designated Israel as the country to which he wished to be sent if found deportable (T. 8, p. 8).

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* References preceded by the letter "T." refer to the tabs affixed to the Certified Administrative Record previously filed with the Court.

Following the hearing the Immigration Judge, in a decision entered August 22, 1973, found that Bronsztejn was deportable by virtue of the conviction and that he was not entitled to any form of discretionary relief from deportation (T. 7). Accordingly, he ordered that Bronsztejn be deported to Israel, the country designated by the alien.

Bronsztejn then took an appeal to the Board of Immigration Appeals. After considering the briefs and hearing oral argument (T. 5), the Board entered an order on November 26, 1974 dismissing the appeal. The Board held that Bronsztejn had been convicted of a violation of a law relating to the illicit possession of marihuana within the meaning of Section 241(a)(11) of the Act (T. 4).

This petition for review was filed on March 28, 1975 and Bronsztejn's deportation was automotically stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statutes

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 241, 8 U.S.C. § 1251—

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) . . . at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana . . .
>
> * * * * *

New York Penal Law

§ 110.00 Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

ARGUMENT

Petitioner's Conviction Pursuant to Sections 110 and 220.05 of the New York Penal Law Renders Him Deportable Under Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(11).

A. Construction of the Federal Immigration Statute

In order to support the deportation charge under Section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), it is incumbent upon the Government to establish that Bronsztejn was "convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . marihuana. . . ." In the deportation hearing the Government proved the conviction by submitting into evidence the certified record of conviction for attempted possession. Bronsztejn, when pleading to the order to show cause, admitted the conviction. However, he now contends that since the conviction was for "attempted" possession of marihuana rather than for possession of marihuana he is not within the class of aliens whose deportation is mandated by Section 241(a)(11).

While it is well-established that factual issues should be resolved in favor of the alien in deportation proceedings, the issue raised by petitioner is a legal one relating to the determination of an excludable class of aliens. It is submitted that the statute which defines the deportable

class should be liberally construed when it would result in the deportation of those aliens whom Congress intended to render deportable. See *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118 (1966).

A number of considerations should be noted which indicate that Congress intended to formulate a stringent policy of deportation with respect to narcotics offenders. First, unlike the prior law, the 1952 Act requires deportation of narcotics addicts, even though they have committed no crime and, apparently, even though they are later cured. Secondly, the addict is the only narcotics offender who is deportable without regard to criminal violation. Third, the statute retroactively applies to narcotics convictions at any time prior to its enactment. Fourth, and most significant in view of the issues raised in the instant case, the 1956 amendments increased the severity of the deportation directives by specifically making them applicable to those convicted of violating laws or regulations relating to the illicit possession of, and not merely trafficking in, narcotic drugs. A 1960 amendment to the Act made the deportation statute specifically applicable to marihuana. Thus, the history of the immigration statute clearly demonstrates that Congress intended a stringent policy of deportation of narcotics and marihuana offenders.

B. Petitioner's conviction

Petitioner seeks to remove his conviction from the ambit of Section 241(a)(11) by advancing the argument that a conviction for attempted possession of marihuana is not a conviction for a "violation of any law or regulation relating to the illicit possession of . . . marihuana . . ." While cases involving attempted possession of a drug and convictions therefor are by no means uncommon, the question of whether an alien is rendered deportable by a

conviction for an *attempt* to commit a crime has rarely been litigated.

In *United States ex rel. Meyer* v. *Day*, 54 F.2d 336 (2d Cir. 1931), the Court stated that "there is no substance in the appellant's contention that there is a distinction in respect to moral turpitude between the commission of the substantive crime of grand larceny and an attempt to commit it." In the *Meyer* case, the alien had been convicted, upon a guilty plea, for attempted grand larceny under former Section 2 of the New York Penal Law. The Court reasoned that an attempt involves specfic intent to do the substantive crime and if conviction for the substantive crime is of such a nature as to render the alien deportable, so also does a conviction for the attempt to commit the substantive crime.

The argument advanced by Bronsztejn was also advanced, in a different context, by the defendant in *United States* v. *Rosenson*, 291 F. Supp. 874 (E.D. La. 1968), *aff'd*, 417 F.2d 629 (5th Cir. 1969), *cert. denied*, 397 U.S. 962 (1970). In that case the defendant had been convicted of attempted possession of narcotics under a Louisiana statute. Rosenson thereafter departed from the United States without registering with a customs official as required by regulation and was convicted of violating 18 U.S.C. § 1407 which prescribes the registration with a customs official of persons convicted of narcotics violations whenever they enter and leave the United States. Rosenson argued that a conviction for attempted possession of narcotics was not a conviction for violating the narcotics or marihuana laws of Louisiana. He premised his argument on the fact that Louisiana had adopted the Uniform Narcotic Drug Act, which does not make attempted possession of narcotics a crime. Rather, Rosenson had been convicted under the general criminal statute of Louisiana. The Court found that Rosenson was guilty of violating a "narcotics law" within the meaning

of a federal statute relating to border crossings by narcotics violators. While recognizing the "ingenuity" of Rosenson's argument, the Court stated that

> "... it must fail for it would require us to engraft subtle distinctions upon the law unwarranted by the clear language of 18 U.S.C. § 1407. That section refers to persons convicted of a violation 'of *any* of the narcotics or marihuana *laws* of ... any state.' This language clearly contemplates *any* of the narcotic or marihuana laws * * * the relevant inquiry is not to determine where the crime is found in the books but rather to determine what the crime is. Here the crime of which the defendant was convicted is attempted possession of narcotics. That should answer the question." *Id.* at 878.

It is submitted that the reasoning of the Court in the *Rosenson* case is equally applicable to the instant case. Just as 18 U.S.C. § 1407 refers to persons convicted of a violation 'of *any* of the narcotic or marihuana laws . . .," so too does Section 241(a)(11) refer to persons convicted of a violation of "*any* law or regulation *relating to* the illicit possession ... of marihuana. ...". The crime of attempted possession of marihuana cannot be segregated from the substantive law, a "law ... relating to ... the illicit possession of marihuana. ..." Absent the crime of possession of narcotics, there could be no crime of attempted possession of narcotics.

Petitioner's reliance on *Varga* v. *Rosenberg*, 237 F. Supp. 282 (S.D. Cal. 1964) is misplaced and demonstrates a failure to properly apply the reasoning of the court to the facts in the instant case. The crucial distinction between the *Varga* case and the instant case lies in the nature of the convictions involved. In *Varga* the alien had been convicted of being under the influence of nar-

cotics while Bronsztejn has been convicted of attempted possession of marihuana. As the *Varga* court pointed out, Congress has aimed its attack "upon possession which would give the possessor 'such dominion and control as would have given him the power of disposal.'" The court in *Varga* reasoned that if the narcotics were already in the system of the convicted person, the person obviously did not have such "dominion and control" as would give him the "power of disposal."

Bronsztejn was convicted of attempted possession of marihuana, *not* with being under the influence of drugs. It is difficult to see how Bronsztejn can analogize his position to that of the alien in the *Varga* case. The certified record of conviction shows that Bronsztejn had "over 6 pounds and 154 LSD pills" in his apartment. Surely Bronsztejn cannot contend that he did not have such "dominion and control" as would give him the power of disposal.

Finally, petitioner seeks to distinguish the recent ruling of this Court in *Oliver* v. *Immigration and Naturalization Service*, — F.2d — (2d Cir. May 15, 1975) on the theory that *Oliver* raised a constitutional question with respect to deportability based on a conviction for possession of narcotics while the instant case raises a question of statutory construction. Petitioner then goes on to ask the Court to construe Section 241(a)(11) "in a manner which takes note of the changing times." But petitioner is, in fact, asking the Court to do that which the Court recognized it cannot do in the *Oliver* decision, *i.e.*, to concern itself with the "validity of distinctions drawn by Congress with respect to deportability." * Peti-

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* We also note that regardless of sympathetic personal considerations in petitioner's case, the Court is powerless to reverse the Board. See *Oliver* v. *I.N.S.*, *supra*.

tioner supports his position by the fact that "a number of states of the Union" have de-criminalized marihuana. The fact that a few states have made the use of marihuana a non-criminal civil offense does not evidence a general change in public attitudes; regardless, it obviously does not allow the contravention of the statute as enacted by the Congress.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 23rd day of Sept 19 75 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Edith Lowenstein, Esq.,
36 West 44th St.
NY NY 10036

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
23rd day of Sept 19 75

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977